No. 92-901

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM JAY LOUWSMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether venue for petitioner's offense was properly laid in the Middle District of Florida.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 970 F.2d 797. The opinion of the district court (Pet. App. B1-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1992. The petition for a writ of certiorari was filed on November 25, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import into the United States more than 1,000 kilograms of marijuana, in violation of 21 U.S.C. 963. He was sentenced to a term of two years' imprisonment. The court of appeals affirmed. Pet. App. A1-A25.

1. In April 1986, Orestes Cossio, one of petitioner's co-defendants, arranged to have approximately 50,000 pounds of Colombian marijuana imported into Collier County, Florida. Cossio arranged with numerous individuals, including petitioner, to move the marijuana from a freighter off the southwest Florida coast to the Miami-Fort Lauderdale area for distribution. Petitioner and two other persons used a fishing vessel to meet the freighter. A portion of the 50,000 pounds of marijuana was loaded onto petitioner's vessel, which then returned to the Dupont area near Everglades City in Collier County. There, petitioner and his companions loaded the marijuana into trucks and vans, and transported it to the Miami-Fort Lauderdale area where it was delivered to Cossio. Gov't C.A. Br. 5.

2. On November 19, 1988, the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1021, 102 Stat. 4672 (codified at 28 U.S.C. 89 note), was signed into law. That statute, which became effective on February 18, 1989, transferred Glades, Collier, and Hendry Counties from the Southern District of Florida to the Middle District of Florida. The law also provided that the amendments

transferring those counties to the Middle District of Florida

> shall apply to any action commenced in the United States District Court for the Middle District of Florida * * * on or after the effective date of this title and shall not affect any action pending in * * * such court on such effective date.

Ibid.; see also Gov't C.A. Br. 2.

On September 19, 1989, a grand jury in the Middle District of Florida returned an indictment charging petitioner and 25 others with various offenses related to the marijuana smuggling and distribution operation. Superseding indictments adding additional defendants were returned on October 11, 1989, and August 2, 1990. The indictments charged that the offenses took place in and around Collier County, Florida, in April 1986. Gov't C.A. Br. 2-3.

Petitioner moved to dismiss the indictment. He contended that the district court lacked jurisdiction because at the time the charged offenses occurred, Collier County was part of the Southern District of Florida. Petitioner argued that the fact that Collier County was later made part of the Middle District of Florida did not divest the Southern District of jurisdiction over offenses that occurred prior to the transfer. Petitioner relied on 18 U.S.C. 3240, which provides that:

> Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory

> prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the case to be removed to the new district or division for trial.

Petitioner also argued that the return of the indictment in the Middle District of Florida violated his right under the Sixth Amendment to be tried by "an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. Amend. VI.

The district court denied petitioner's motion to dismiss. Pet. App. B1-B5. The court first rejected (Pet. App. B2-B3) petitioner's Sixth Amendment claim, holding that his right to be tried by a jury of his peers in a district previously ascertained by law was fully protected by a trial in the Middle District. The jury in that district, the court pointed out, would be drawn in part from Collier County, where the crime allegedly occurred. Pet. App. B3.

The district court also rejected (Pet. App. B3-B5) petitioner's contention that 18 U.S.C. 3240 required that the action be brought in the Southern District of Florida. The court concluded that Section 3240 had effectively been superseded by the amendment of 28 U.S.C. 89 in Public Law 100-702, which provided that "any actions involving the transferred counties commenced after the effective date of the amendment shall be brought in the Middle District of Florida." Pet. App. B5.

Petitioner subsequently entered a conditional plea of guilty to Count 1 of the second superseding indictment, preserving his right to challenge the district court's jurisdiction on appeal. On motion of the government, the district court dismissed the other three counts of the indictment as to petitioner. Gov't C.A. Br. 4.

2. The court of appeals affirmed. Pet. App. A1-A25. The court rejected (Pet. App. A5-A17) petitioner's claim that 18 U.S.C. 3240 required the case to be brought in the Southern District of Florida. The court concluded that Section 3240 and Public Law 100-702 were mutually inconsistent. Under "general principles of statutory construction," therefore, Public Law 100-702, which was a subsequent, specific statute providing that all actions commenced after the effective date of the amendments shall be brought in the Middle District of Florida, controlled over Section 3240, the earlier, more general statute.

The court of appeals also rejected (Pet. App. A17-A25) petitioner's Sixth Amendment claim. Petitioner argued that the "previously ascertained by law" clause of that amendment prohibited Congress from transferring venue from one district to another after a crime had been committed. After reviewing the "sparse history of the Sixth Amendment" and finding itself unable to "divine the intent of the framers," the court looked for guidance to "other than purely historical considerations," namely, "the function served by the jury in contemporary society." *Id.* at A18, A22-A23. Relying on *Williams* v. *Florida*, 399 U.S. 78, 100 (1970), the court concluded that because the crime was committed in what is now the Middle

District of Florida, trial there did "more to ensure that [petitioner was] tried by a jury of peers from his community" than trial in the Southern District of Florida. Pet. App. A24. Trial in that district therefore did not violate petitioner's Sixth Amendment interests.

ARGUMENT

Petitioner contends (Pet. 9-26) that the United States District Court for the Middle District of Florida lacked jurisdiction because his offense was committed in Collier County, Florida, at a time when that county was part of the Southern District of Florida.

1. Petitioner claims that venue in the Middle District is barred by the Sixth Amendment's requirement that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. Amend. VI. Petitioner claims that the "previously ascertained by law" clause prevents Congress from rearranging judicial districts in a way that changes the venue for prosecution of an offense after it is committed but before the indictment is returned. That claim is without merit.

In our view, the "previously ascertained by law" clause requires that the judicial district in which a case is tried be determined by law prior to the bringing of the indictment. That is what occurred here. Petitioner urges that the word "previously" requires that the judicial district be determined by reference to the time when a crime is committed

rather than when it is charged. Nothing in the text compels that result. Rather, it is consistent with the language of the clause to interpret the word "previously" as requiring the judicial district to be determined prior to the time of the indictment, not prior to the time the defendant committed his crime.

Although the historical records do not discuss the "previously ascertained by law" clause, the clause appears to have been intended to ensure that Congress could not alter a judicial district in order to affect the outcome of an individual case. There has been no suggestion that the transfer of Collier County to the Middle District of Florida was motivated by the facts of this case, which was initiated after the effective date of the transfer. Petitioner relies on *Zicarelli* v. *Dietz*, 633 F.2d 312, 323 (3d Cir. 1980), cert. denied, 449 U.S. 1083 (1981), which suggested in dictum that the "previously ascertained by law" clause prevents Congress from redefining a district after a crime was committed.[1] That court also stated, however, that its view was founded on speculation, and noted that the clause may have been included to provide "some assurance that the districts would not be readjusted

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[1] The issue in *Zicarelli* was whether the "previously ascertained by law" clause should be incorporated into the Fourteenth Amendment and made applicable to the States. As petitioner points out (Pet. 12), the court suggested that the clause prevents Congress from changing the venue for an offense after it is committed. See *Zicarelli*, 633 F.2d at 323. That issue was not directly presented, however, and the court ultimately concluded that the clause is not applicable in state prosecutions.

arbitrarily to meet the circumstances of a particular case." *Ibid.*[2]

The interpretation we urge is fully consistent with the purposes of the Sixth Amendment. In analyzing jury trial claims under the Sixth Amendment, this Court has referred to the function a particular feature performs and its relation to the purposes of trial by jury. *Williams* v. *Florida*, 399 U.S. 78, 99-100 (1970). The Sixth Amendment's jury trial provision guarantees the defendant a trial by a jury of his peers drawn from the place where the crime was committed. That right was preserved in this case by bringing the prosecution in the district that includes Collier County, where petitioner committed his crime.

Petitioner's prosecution in the Middle District of Florida ensured that he would be tried by jurors drawn in part from the place where his crime occurred, rather than from other counties, which would have been the case if he had been prosecuted in

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[2] The other cases on which petitioner relies, *Mizell* v. *Beard*, 25 F.2d 324 (N.D. Okla. 1928); *United States* v. *Hackett*, 29 F. 848 (C.C.N.D. Cal. 1887), also do not help him. As the court of appeals noted (Pet. App. A21-A22), they address the "previously ascertained by law" clause in the context of newly created district courts that did not exist at all at the time the offenses in question were committed, and are distinguishable on that basis. Moreover, in both cases the courts concluded that the applicable jurisdictional statutes required the prosecution to be brought in the prior judicial district, and neither court had occasion to reach the constitutional issue raised by petitioner. Nor did either court address that issue, except to note that its interpretation of the jurisdictional statutes was consistent with the Sixth Amendment. Neither court held, or even suggested, that its interpretation of the applicable statutes was *required* by the Constitution.

the Southern District of Florida. In the newly constituted Southern District, no jurors would have been drawn from the site of the offense, Collier County. By contrast, laying venue for petitioner's offense in the newly constituted Middle District of Florida, and especially in the Ft. Myers Division where petitioner was charged, ensured that the jurors would be drawn from the general area in which the crime was committed. By assuring that he would be tried in the "vicinage" or "neighborhood" surrounding the situs of the offense, petitioner's indictment in the Middle District of Florida was thus fully consistent with his Sixth Amendment right to be tried by a jury of his peers. See *Williams* v. *Florida*, 399 U.S. at 92-94, 100.

2. Petitioner also contends (Pet. 15-26) that 18 U.S.C. 3240 required that he be tried in the Southern District of Florida. That statute generally provides that whenever a county has been transferred from one judicial district to another, prosecutions of offenses committed within that county at a time before the transfer shall be commenced and tried as if the transfer had not occurred. Prior to the enactment of the predecessor statute to Section 3240,[3] whenever Congress transferred counties from one judicial district to another, it was necessary to specify whether the original district or the new district would have jurisdiction over crimes committed before the date of the transfer. See *Lewis* v. *United States*, 14 F.2d 369, 370-371 (8th Cir. 1926), aff'd, 279 U.S. 63

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[3] The predecessor statute was 28 U.S.C. 121 (1940). See *Hayes* v. *United States*, 407 F.2d 189, 191 (5th Cir.), cert. dismissed, 395 U.S. 972 (1969).

(1929). Congress enacted the predecessor statute to Section 3240 to obviate the need to enact a separate jurisdictional provision to accompany each transfer. *Ibid.* By passing the predecessor statute, however, Congress did not divest itself of power to decide in particular circumstances that crimes occurring before the date of transfer should be charged and tried in the new district rather than the original district.

In Public Law 100-702, Congress simply suspended the operation of Section 3240 with respect to the transfer of Hendry, Glades, and Collier Counties from the Southern District of Florida to the Middle District of Florida. It did so by providing that the transfer of those counties "shall apply to any action commenced [in the Middle District] on or after the effective date of [the act]." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1021, 102 Stat. 4672 (1988).

As the later and more specific statute, Public Law 100-702 supersedes the more general statute, Section 3240, with respect to the subject matter to which it is addressed. See *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834-835 (1976).[4] Thus, the court of appeals correctly concluded that the specific terms of Public

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[4] Petitioner is mistaken in suggesting (Pet. 17-19) that the decision of the court of appeals is in conflict with decisions of this Court, *e.g.*, *Lewis* v. *United States*, 279 U.S. 63 (1929), and of other courts of appeals, *e.g.*, *Hayes* v. *United States*, 407 F.2d at 190-192. The allegedly conflicting cases simply construed the then-applicable jurisdictional statutes and determined that venue lay in the prior judicial district. Those cases were decided long before the enactment of Public Law 100-702, and had no occasion to consider its effect on Section 3240 in the circumstances of this case.

Law 100-702 must control over the general terms of Section 3240.

3. The question presented in the petition applies only to prosecutions for offenses committed in the three affected Florida counties before February 18, 1989, the effective date of Public Law 100-702, that were not charged in the newly constituted Middle District of Florida until after that date. The number of such cases is quite small. The question presented is unlikely to recur with any frequency and thus is not one of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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